SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 1097 144

LAWRENCE BAKING COMPANY, A MICHIGAN CORPORATION,

Petitioner,

vs.

MICHIGAN UNEMPLOYMENT COMPENSATION COMMISSION.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

ALVA M. CUMMINS,
Counsel for Petitioner.

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Summary Statement of Matter Involved.

On July 1st, 1941, petitioner was the operator of a wholesale bakery in Lansing, Michigan, and at that time employed ninety-eight persons. On that date sixteen employees went on strike and picketed the plant. The operations of the employer were interrupted only to the extent of delaying the baking of the bread for about fifteen minutes and some delay in the cake department. The work continued uninter-

ruptedly thereafter. The strike continued until September 16, 1941, during which time both picketing and negotiations continued. The striking employees filed claim for unemployment benefits for the period beginning July 8. The Supreme Court of Michigan on February 24, 1944, sustained the right to compensation. Motion for rehearing was denied April 7, 1944. Judgment was entered accordingly.

The Michigan Unemployment Compensation Act provides for taxation of employers to create a fund for the payment of benefits to the unemployed. This fund must be reimbursed from time to time by additional contributions based in amount on each particular employer's experience record in the matter of unemployment. The employer pays in accordance with the extent of unemployment experienced in his business. In this it differs from the New York type of statute which taxes all employers at a flat and equal rate, which statute was considered by this Court in *Chamberlain* v. *Andrews*, 299 U. S. 515.

By the original Act benefits were carefully limited to cases of involuntary unemployment and the Supreme Court held that no part of the fund could be used in the financing of a strike. *Chrysler Corporation* v. *Smith*, 297 Mich. 438. But, without in any way (except by implication) changing these provisions, by Act No. 364 P. A., 1941,* an obscure amendment was adopted which the Supreme Court of Michigan held to mean as follows: (We quote from the opinion.)

> "Under the amendment as construed employees (strikers) are disqualified if the labor dispute results in a stoppage of the employer's work and they are not disqualified if the labor dispute does not result in such stoppage."

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* Appendix.

The Questions Involved.

This case raises the question whether the statute referred to takes property without due process of law and whether it denies equal protection of the law.

The questions here posed are two:

1. Is it within the legislative power to provide for payment of unemployment compensation to strikers, from funds raised by taxation based on experience records, without regard to the rightfulness or wrongfulness of the strike?

2. If such power exists, is there in this law an arbitrary discrimination as between employers and as between employees based on whether the strike stopped or did not stop work in the employer's plant?

ARGUMENT.

As to Question Number 1.

At the outset, we submit that, obviously, if the legislative power constitutionally extends to the payment from funds so raised of benefits to strikers who do not succeed in bringing about a stoppage of work in the plant, it follows as a necessary corollary that the legislature can, if it so wills, award compensation to strikers who do so succeed. We think there can be no possible basis for saying that the legislative power is sufficient to authorize unemployment compensation to strikers if work goes on but that the legislature has no power to give compensation to strikers if the work stops. It is unthinkable that the one can be done but that the other can't be done.

But we submit that it is also unthinkable that employers generally—all employers—can be taxed to create funds to pay strikers generally—all strikers—benefits for unemployment while on strike, with, of course, the power to increase

the amount of such benefits to the full wage of the employee.

There is no place to draw the line and say the one is constitutional and the other is not.

That power if fully exercised would be ruinous. The only alternative would be to yield to whatever demands might be made. Even under the statute here in question the coercive power is very great to compel employers to yield to all demands or close down.

We submit there is only one place to draw the line as to unemployment compensation, *and that is between voluntary and involuntary* unemployment. That is the point where the line was drawn at the start in this state and we think in every state in the country, and where the line was drawn when this Court sustained the principle of unemployment compensation. No one would have thought at that time of suggesting that strikers could or should be paid benefits while on strike. By this we are not contending that a law would be invalid which provided for payment to strikers who are in some legal way found to have had cause for striking. Such a strike might with reason be deemed involuntary.

The majority of the Supreme Court of Michigan in deciding this case said:

> "Plaintiff's argument is based upon the assumption that the claimants were wrongfully on strike; were not justified in striking; that the strike was their own fault;"

But the argument involves no such assumption. Every one knows that strikes are sometimes justified and sometimes without valid cause. There can be no assumption that a strike is rightful or wrongful. *Our contention is that unless a law makes provision for determining the rightfulness or wrongfulness of a strike and awards compensation to strikers only after the strike has been determined to be*

rightful, that law is unconstitutional. To take money by taxation to be paid to strikers regardless of whether the employer is in the right or in the wrong, and which the employer must replace, is to take property without due process of law and in denial of the equal protection of the law. There is no inkling of a public purpose in such a tax. The legislative power to tax is broad indeed, but yet it must be possible to suppose with reason a public benefit to arise from it, or else it is invalid.

Such a law places the employer wholly at the mercy of his employees; it literally takes his money to finance a strike against himself.

The idea is fantastic, but a majority of the Michigan Supreme Court said, in substance, that the legislature must have meant that because by the amendment it must have meant *something* and no other possible meaning could be imagined.

And having found that that was what the legislature meant it was also said that it violates no provision of the State or National Constitution. We venture to think that this conclusion was dogmatic rather than reasoned, but, at any rate, it was so held.

Question No. 2.

Petitioner submits that imposing added taxation on some employers and exempting others and providing compensation for some employees and denying it to others in the same situation except as to the single matter of stoppage of work is an arbitrary discrimination. What does the question of stoppage of work in the establishment have to do with the question as to whether, and to what extent, strikers should be paid benefits or employers taxed?

Stoppage of work is a matter over which strikers ordinarily have no control. No doubt the striking group in-

volved in this case hoped to stop the operation of the plant. If they had succeeded they would have gone without pay, but since they didn't succeed, they are to be paid. Whether work shall stop or not might depend on many things; among them the strength or weakness of the strike, the mental attitude of the employer, the availability of new employees, etc. But one thing is clear: *A small and unimportant group might strike at will and go fishing and be sure of pay meanwhile, because, being small and unimportant, they could be sure that there would be no stoppage of work.*

Of course, we recognize as sound law the holding of this Court in *Carmichael* v. *Southern Coal and Coke Company*, 301 U. S. 495 (57 Supreme Court 868, Sup. Ct., 81 Law Ed. 1245) where the Court said:

> "A legislature is not bound to tax each member of a class or none. It may make distinctions of degree having a rational basis and when subjected to judicial scrutiny they must be presumed to rest on that basis if there is any conceivable state of facts which would support it."

We think this also would be good law if the word "benefit" were substituted for the word "tax." *But there must be "a rational basis."* And what rational basis is there for saying a given employer shall be taxed more or less depending upon whether a strike stops or does not stop the operation of his plant?

Likewise, is there any sense in saying that benefits shall depend upon the same thing?

The Michigan Court stresses the point that all *similarly* situated are treated alike. But is that true? Are not all striking employees and all employers similarly situated in all *material* respects? Are irrelevant dissimilarities to be made the basis of discrimination? It seems to us that it

would be no more unreasonable to say that all left-handed strikers should be paid but right-handed ones should be disqualified. The law starts out with all employers constituting a class to be taxed and all employees a class to be benefited (except where exempt because of the small number of employees). Then by this amendment, as construed, both employers and employees are divided into two classes to be taxed or not and to be benefited or not, depending upon circumstances which have no bearing on the question whatever.

Throughout this case we have challenged counsel and urged upon the Courts that, if there is any reasonable basis for these distinctions it must be possible to formulate and state the reason. Except as to matters that are axiomatic, we can't conceive of a reasonable conclusion that can't be supported in some degree by argument. In *Carmichael* v. *Southern Coal and Coke Company*, supra, this Court had no difficulty in pointing out adequate reasons for the discrimination there involved. But it is a far cry from that to saying "If nobody can think of and express a possible reason yet we will still presume that reasons exist." Reasonable basis like reasonable doubt calls for the application of common sense.

This Court has said with reference to a failure to show the reason upon which a discrimination rests:

> "The appellees do not intimate that the classification bears any relation to the public health or welfare; that the provision will discourage monopoly; or that it was aimed at any abuse, cognizable by law, in the milk business. In the absence of any such showing we have no right to conjure up possible situations which might justify the discrimination. The classification is arbitrary and unreasonable and denies the appellant the equal protection of the law."
>
> *Mayflower Farms* v. *TenEyck*, 297 U. S. 266, 80 Law Ed. 675.

The word "conjure" was used, we have no doubt, advisedly, but, we submit, the only way to find a reason to support the rule in the case at bar is to "conjure it up."

The test laid down in the minority opinion in the same case was as follows:

> "A statutory discrimination will not be set aside as the denial of equal protection of the law if any state of facts reasonably may be conceived to justify it."

Applying this test, we inquire, what state of facts *reasonably* can be conceived to justify this discrimination? *Conceiving* a reasonable state of facts is wholly a different thing from *presuming* such a state of facts in spite of inability to conceive it. Yet the Court below has contented itself with the statement (which seems to us to be merely dogmatic assertion) "under the amendment, as construed, employees are disqualified if the labor dispute results in a stoppage of the employer's work and they are not disqualified if the labor dispute does not result in such stoppage. This is a reasonable means of determining qualification for benefits and does not result in arbitrary or unjust discrimination between employers."

True, in passing on this point the Court quoted from *In re Steelman,* 219 N. C., 306 (13 S. E. (2nd) 544.) But in that case the Court was considering, as was expressly stated in the opinion, a question of statutory construction only. How that decision has any bearing on this question we are unable to see. Ironically enough as to its applicability to the instant case, that court thought it worthwhile to comment on the fact that the state, by its statute, sought "to be neutral in the labor dispute as far as practicable and to grant benefits only in conformity to such neutrality." A striking contrast indeed to the Michigan statute as construed! In the *Chrysler* case, supra, the duty of neutrality was emphasized, but the very opposite of neutrality is em-

bodied in this statute (as construed). The only possible neutral position would be to say "There can be no compensation for strikers without providing a method of determining which side is at fault."

Of course, the language of Mr. Justice Holmes quoted in the *Steelman* case states a principle to be applied *in reaching a conclusion* but it is no support for a conclusion either way. We submit this case meets the test there laid down and is "very wide of the mark."

Importance of Case.

Due to the fact that public questions were involved no costs were allowed by the Michigan Supreme Court.

The provisions here involved are found in the statutes of a number of states and except in Oklahoma, are being administratively enforced in accordance with the interpretation made by the Michigan Court. The Oklahoma Supreme Court, held that "stoppage of work" referred to the work of the employee and not that of the plant. *Board of Review* v. *Mid-Continent Petroleum Corp.*, 141 Pac. 69. The matter then is one of countrywide importance. We find no court decision other than Michigan as to the questions here raised.

In some states, however, the tax is on a flat rate instead of one based on individual experience. In such cases, of course, the payment of benefits does not directly result in an *additional* tax on the employer.

Petitioner respectfully requests that a writ of certiorari be granted out of and under the Seal of this Honorable Court directed to the Supreme Court of the State of Michigan commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein; and that the judgment of the Supreme

Court of the State of Michigan be reversed by this Honorable Court, and your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet.

ALVA M. CUMMINS,
Counsel for Petitioner.
Business Address:
312 Capitol Savings & Loan Bldg.,
Lansing 1, Michigan.